



# Brief Times

## Ex Parte Interviews Of Employees of Corporate Adversaries: Ethical Or Not



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Litigation requires aggressive investigation tempered by adherence to a code of professional responsibility. This tension is often present when dealing with disputes involving businesses and corporations with existing and former employees with knowledge of the relevant facts and circumstances.

Ex parte interviews with current/former employees is addressed in R.P.C. 4.2 which states that a lawyer cannot interview a person who is known to be represented by another lawyer. However, application of that rule is often difficult in practice.

In In the Matter of

OPINION 668 (1993) 134 N.J. 294, the court limited witness contact to the “control group” or “those employees of the organization entrusted with the management of the case or matter in question” and employees whose conduct establishes the organization’s liability, and then only required “notice to rather than consent from the organization’s attorney.”

In 1996 N.J. amended Rule 4.2 providing that “the bar against ex parte communications should only apply in situations

Continued On Page Three where the employee is not only a fact witness but also significantly

involved in determining the organization’s legal position.”

In *Michaels v. Woodland*, 988 F.Supp. 468 (D.N.J.1997),



“Hello, my name is Francis Garrity and I represent ABC corporation. We would like to speak with you about the incident on 2/14/03.”

the Court emphasized the need

### Special points of interest:

Ex Parte Interviewing

Azursak vs. CPI

Champion Dyeing v. Centennial Insurance

Relaxation of Certificate of Merit Consequences in Malpractice Cases

Homeowner Pool Liability

• N.J. Cases Of Interest

## Unconstitutional Amendments To No Fault

See: Caviglia vs. Royal Tours of America and Hector Mundo, The 1997 amendment of N.J.S.A. 39:6A-4-5 effected a change of precluding suit by an uninsured injured driver against the tortfeasor for any element of damage. The sec-

tion precluded an uninsured motorist from any compensation from the person who negligently or intentionally caused the incident, irrespective of the severity of the injuries, irrespective of whether the tortfeasor himself was uninsured, and

irrespective of whether the tortfeasor was driving while intoxicated or under some disability.

The Court found that such total preclusion was constitutionally unsustainable under equal protection or substantive due process.



## New Jersey Recent Cases Of Interest

In **James v. Arms Technology**, the Appellate Division allowed a city to sue gun manufacturers, trade associations, distributors and retailers on theories of negligence, public nuisance and punitive damages.

In **White v. Mattera**, the Supreme Court found that the increased hospital malpractice liability limit applied to malpractice which occurred before the increase where the manifestation of injury occurred after the amendment.

In **Palisades v. Bastien**, the Supreme Court found that an insured’s wife, intentionally omitted from the husband’s auto policy, was not eligible for PIP coverage.

In **Silvestri v. Optus**, the Supreme Court found that a subjective standard governs an employment contract provision that reserves to the company the right to terminate an employee for failure to perform satisfactorily, unless there is some contractual language that

the parties intended an objective standard.

In **Tighe v. Peterson**, the Supreme Court found that a pool owner has no duty to warn a social guest about the depth of the pool.

In **Sacci v. Metaxas**, the Appellate Division refused to impose a duty on a wife to warn others of the abusive nature of her husband.

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Recent New Jersey Court Decisions

## Environmental Coverage: Trigger, Allocation and “Going Bare” Revisited

In **Champion Dyeing v. Centennial Insurance**, the N.J. Appellate Division determined that in the context of an Owens-Illinois allocation among CGL carriers and the insured, in order to demonstrate that the insured chose to “go bare” after the advent of the absolute pollution exclusion, the CGL carriers would be required to dem-

onstrate the insured could have purchased EIL insurance that would have covered the precise risk that ultimately manifested.

Demonstrating merely that EIL coverage was generally available was insufficient, but it was not necessary for a CGL carrier to demonstrate the insured subjectively elected to go

bare. The Court also reasoned that since EIL coverage was generally written on a claims-made basis, only the amount of coverage in the year the claim was made would be considered for purposes of computing the insured’s “bare share” in an Owens-Illinois allocation.



Environmental Coverage Law: Evolving Landscape

## Indemnification Provision Must Be Specific To Be Enforceable In New Jersey

In **Azurak v. CPI**, the N.J. Supreme Court once again dealt with the enforcement of an indemnity agreement between a service company and a property owner for suit by a visitor to the premises. The contract between the owner and the contractor included a provision

for indemnity for liability arising out of the vendor’s performance under the contract.

The Court referenced the early case of **Dolougherty v. Blanchard Construction** 139 N.J. Super 110 (1976) and stated that broad versus limited provision comparison is no

longer good law. The Court stated that an indemnification provision must specifically reference the negligence of the indemnitee in order for indemnity for such acts to be provided.



Judicial Enforcement Of Indemnification Agreements In Vendor Ser-



# Unconstitutional Punitive Damages Awards

Courts and the public are beginning to realize the adverse effect of unreasonable punitive damage awards.

In *State Farm v. Campbell* The U.S. Supreme Court found a \$145 million Bad Faith award unconstitutional where the compensatory award was \$1 million.

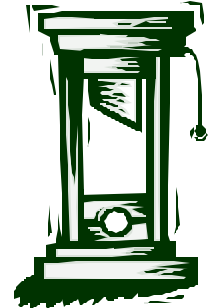
Defendants have long argued that the Due Process Clause prohibits imposition of grossly excessive or arbitrary

awards. It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence.

Courts have been reluctant to set a ratio between compensatory and punitive damages, - other than to list factors for consideration in *BMW vs.*

## Gore.

However, few awards exceeding a single digit ratio between punitive damages and compensatory damages will satisfy Due Process. Single digit multipliers are more likely to comport with Due Process while still achieving deterrence and retribution goals.



How Much Punishment Is Constitutional?

# Ex Parte Communications

Continued From Page One

to determine first whether a person is part of a control group before pursuing "substantive ex parte communication" while allowing contact in order to make that determination. The Court also permitted ex parte interviews of employees who were not part of the control group, but added additional requirements.

Such witnesses are to be advised that they have the right to refuse the interview. If the witness indicates that he is represented, the interview must be terminated.

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Determining where the witness fits into the adversaries corporate structure before contact Is critical.

# New Jersey Recent Cases Of Interest

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In *Rubin v. Chilton*, the Appellate Division upheld NJ state statute on age discrimination protecting independent contractor's employees, while providing broader protection than federal law.

In *Kosmoski v. Atlantic City Medical Center*, the New

Jersey Supreme Court remanded a case dismissed by a trial judge due to the unavailability of the expert. In a return to reason, the court noted that a client should not be penalized for the negligence of the attorney in complying with trial dates.

In *Leodori v. CIGNA*, the Supreme Court found that an employee must agree to waiver-of-rights provision contained in Employee Handbook.

In *Casinelli v. Manglapus*, the Appellate Division continued to dilute the Certification Of Merit consequences.





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## Ex Parte Communications

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Ex Parte Interviewing Of Potential Witnesses - In Addition To The Review Of Documents And Exhibits - Is An Essential But Often Overlooked Litigation Tool.

In *Klier v. Sordoni Skanska Construction Company*, 337 N.J. Super. 76 (2001) the Court found that to have ex parte communications with a current employee (as opposed to former employee) counsel must be determined if the witness is part of the control group or has other representation. If the witness is not part of the control group and does not have other representation, ex parte communication is permitted.

For former employees, “if they were part of the organization’s control group they are presumptively represented by the organization and

may not be interviewed unless they disavow representation.”

At Garrity Graham we believe that aggressive representation requires an early determination of potential witnesses, a good-faith determination of whether they would be of the category of witnesses to fall under a control group, and then should be contacted only with a clear indication of their rights.

Of course, contact and investigation should be undertaken as quickly as possible in order to benefit the client and

the investigation.

For assistance with your litigation investigations or further information regarding ex parte interviews, please do not hesitate to contact any of our litigation partners or litigation paralegal Sherri Hiner who assisted in the research and writing of this article.